

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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MAXINE VESTERHALT,

Plaintiff,

-against-

THE CITY OF NEW YORK, POLICE OFFICER BAHIR
MUSTAFA, Shield No. 8703, DETECTIVE THOMAS
HOURICAN, Shield #7555, DETECTIVE ROBERT
YAEGER, Shield #5676, DETECTIVE TRACY
KUPINSKI, Shield #6863, DETECTIVE THOMAS
DRISCOLL Shield #7187, and LIEUTENANT RUEL
STEPHENSON, 28th Precinct,

Defendants.
----- X

**DECLARATION OF PHILIP
S. FRANK IN SUPPORT OF
DEFENDANTS' MOTION TO
ENFORCE SETTLEMENT
OR IN THE ALTERNATIVE
FOR SUMMARY
JUDGMENT**

07 Civ. 02142 (MGC)

PHILIP S. FRANK, an attorney duly admitted to practice in the Courts of New York, declares, under penalty of perjury and pursuant to 28 U.S.C. § 1746, that the following statements are true:

1. I am an Assistant Corporation Counsel in the office of Michael A. Cardozo, Corporation Counsel of the City of New York, attorney for defendants City of New York, Bahir Mustafa, Thomas Hourican, Robert Yaeger, Tracyann Kupinski, Thomas Driscoll, and Ruel Stephenson. I am familiar with the facts and circumstances stated herein and submit this declaration in support of defendants' motion to enforce the settlement agreement or in the alternative for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure.

2. Plaintiffs Tyree Davis, Elizabeth Elohim, and Maxine Vesterhalt commenced this action by filing a complaint under docket number 07 Civ. 2142 on or about March 13, 2007 and an amended complaint on or about December 7, 2007.

3. Since the commencement of this lawsuit, plaintiffs have been represented by Anthony C. Ofodile, Esq.
4. On March 25, 2008, plaintiffs' counsel made an initial settlement demand to the undersigned of \$300,000: \$75,000 for plaintiff Vesterhalt, \$100,000 for plaintiff Davis, and \$125,000 for plaintiff Elohim.
5. On April 2, 2008, Mr. Ofodile lowered plaintiff Vesterhalt's demand from \$75,000 to \$60,000.
6. The following day, on April 3, 2008, plaintiff's counsel made a global settlement counter demand of \$225,000 for all three plaintiffs including Ms. Vesterhalt.
7. On April 16, 2008, pursuant to Rule 68 of the Fed. R. Civ. P., counsel for defendants made an offer of \$5,001 to plaintiff Vesterhalt, \$10,001 to plaintiff Elohim, and \$5,001 to plaintiff Davis.
8. On August 28, 2008, counsel for plaintiffs made a demand of \$50,000 for plaintiff Vesterhalt, \$75,000 for plaintiff Davis, and \$100,000 for plaintiff Elohim, totaling \$225,000.
9. On September 23, 2008 at approximately 1:00 p.m., plaintiffs Vesterhalt, Elohim, and Davis all appeared with their counsel, Mr. Ofodile at a settlement conference with counsel for defendants before the Honorable Debra C. Freeman.
10. Plaintiff Vesterhalt was present during the entire settlement conference, and engaged in the settlement discussions with her attorney present. Not once during the entire settlement conference did plaintiff Vesterhalt indicate to counsel for defendants or to the Court that her attorney, Mr. Ofodile, did not have authority to settle the case on her behalf nor did she state to counsel for defendants or to the Court that her attorney's authority to settle the case was restricted in any way.

11. By Order dated September 26, 2008, the Honorable Miriam Goldman Cedarbaum set a jury trial for the case to begin on December 8, 2008.

12. On October 3, 2008, pursuant to Rule 68 of the Fed. R. Civ. P. counsel for defendants made an offer of \$50,001 to plaintiff Elohim.

13. By email dated October 8, 2008, counsel for plaintiff Elohim accepted defendants' Rule 68 offer of judgment of \$50,001.

14. On November 12, 2008, counsel for defendants and counsel for plaintiffs entered into an oral agreement to settle the matter in the amount of \$27,500 for plaintiff Vesterhalt, \$40,000 for plaintiff Davis, and \$40,000 in attorneys fees related to plaintiff Elohim's acceptance of the Rule 68 offer of judgment of \$50,001.

15. Counsel for defendants memorialized the settlement agreement with plaintiffs in writing and sent the settlement paperwork to counsel for plaintiff by letter dated November 14, 2008.

16. By letter dated November 14, 2008, counsel for defendants informed the Court on behalf of all the parties that the action settled on November 12, 2008 and that the Stipulation and Order of Settlement and Discontinuance was to be submitted to the court upon execution. Furthermore, the letter stated that, "Because of the settlement, the parties respectfully request that the trial date and all due dates for pre-trial submissions be cancelled."

17. By letter dated February 3, 2009, annexed hereto as Exhibit "A," counsel for plaintiffs, Mr. Ofodile, informed the Court that, "All three Plaintiffs, Tyree Davis, Elizabeth Elohim and Maxine Vesterhalt had agreed to the settlement of this case after protracted negotiations." Moreover, Mr. Ofodile declared that, "all [the plaintiffs] signed the settlement papers" and that "Ms. Vesterhalt also signed her papers" and "executed" the General Release and Affidavit of No

Liens. However, the following day, Ms. Vesterhalt asked that counsel hold onto the settlement papers because “she had changed her mind about settling for the amount she agreed to.”

18. By signing the General Release, plaintiff Vesterhalt agreed to release defendants from any claims alleged in the complaint in consideration of the total payment to plaintiff of \$27,500 by the City of New York.

19. Annexed as Exhibit “B” is a copy of the Court Docket sheet.

20. Annexed as Exhibit “C” is a copy of the Amended Summons and Complaint, filed on or about November 14, 2007.

21. Annexed as Exhibit “D” is a copy of the March 12, 2006 Sprint Report.

22. Annexed as Exhibit “E” are excerpts from the deposition of plaintiff Tyree Davis, taken on May 21, 2008.

23. Annexed as Exhibit “F” is a copy of the Aided Report Worksheet, dated March 12, 2006.

24. Annexed as Exhibit “G” are excerpts from the deposition of plaintiff Elizabeth Elohim, taken on May 23, 2008.

25. Annexed as Exhibit “H” is a copy of medical records from St. Luke’s-Roosevelt Hospital Center, dated March 12, 2006.

26. Annexed as Exhibit “I” are excerpts from the deposition of defendant Bahir Mustafa, taken on August 14, 2008.

27. Annexed as Exhibit “J” are excerpts from the deposition of defendant Ruel Stephenson, taken on August 8, 2008.

28. Annexed as Exhibit “K” are excerpts from the deposition of defendant Robert Yaeger, taken on August 11, 2008.


29. Annexed as Exhibit "L" are excerpts from the deposition of plaintiff Maxine Vesterhalt, taken on May 30, 2008.

30. Annexed as Exhibit "M" are excerpts from the deposition of defendant Thomas Driscoll, taken on August 22, 2008.

31. Annexed as Exhibit "N" are excerpts from the deposition of defendant Tracyann Kupinski, taken on August 14, 2008.

Dated: New York, New York
June 24, 2009

MICHAEL A. CARDOZO
Corporation Counsel of the
City of New York
Attorney for Defendants City of New York,
Bahir Mustafa, Thomas Hourican, Robert
Yaeger, Tracyann Kupinski, Thomas
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By: 
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Assistant Corporation Counsel

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MAXINE VESTERHALT,

Plaintiff,

-against-

THE CITY OF NEW YORK, POLICE OFFICER
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#7555, DETECTIVE ROBERT YAEGER, Shield
#5676, DETECTIVE TRACY KUPINSKI, Shield
#6863, DETECTIVE THOMAS DRISCOLL Shield
#7187, and LIEUTENANT RUEL STEPHENSON,
28th Precinct,

Defendants.

**NOTICE OF MOTION, DEFENDANTS'
STATEMENT OF UNDISPUTED FACTS
PURSUANT TO RULE 56.1, , DECLARATION OF
PHILIP S. FRANK IN SUPPORT OF
DEFENDANTS' MOTION TO ENFORCE
SETTLEMENT OR IN THE ALTERNATIVE FOR
SUMMARY JUDGMENT AND EXHIBITS**

*MICHAEL A. CARDOZO
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New York, N.Y. 10007*

*Of Counsel: Philip S. Frank
Tel: (212) 788-0893
NYCLIS No. 2007-014160*

Due and timely service is hereby admitted.

New York, N.Y., 2009

.....Esq.

Attorney for